CANADA
A
COUNTRY
WITHOUT
A
CONSTITUTION

A Factual Examination of the Constitutional Problem

BY
WALTER F. KUHL
MEMBER OF PARLIAMENT
JASPER - EDSON 1935 - 1949

JANUARY, 1977

"IT IS THEREFORE EASY TO SEE WHY CANADA IS NOT A CONFEDERATION . . . . . ."
(Dr. Maurice Ollivier, K.C., Joint Law Clerk,
House of Commons, before the Special Committee
on the British North America Act, 1935)

"I have always contended, for reasons too long to enumerate here, that it (Canada) has not become either a confederation or a federal union."
(Dr. Ollivier, in a personal letter to Mr. Kuhl, May 30, 1936)

FORWARD

There is probably no political issue in Canada on which there is more lack of information and more misinformation than on the constitutional question. The stalemate and the impasse which the governing authorities in Canada have reached on this question seem to indicate that there is and has been something very fundamentally awry in Canada's constitutional history.

For almost half a century this controversy has been raging without a satisfactory solution having been arrived at. Many Canadians, myself included, have had enough of this bickering between politicians and are determined to do something to bring this internicine strife to an end.

The purpose of this booklet is to indicate in some measure what I as a member of the House of Commons and as a private citizen have attempted to do to bring order out of the constitutional chaos in which Canada finds herself. Democracy is successful only in proportion to the knowledge which people have with respect to their rights and privileges. It is my hope that the information contained in this brochure will assist Canadians to that end.

Immediately following the recent Quebec election, I sent to Mr. Rene Levesque a personal letter in which I indicated my conception of the constitutional rights which the provinces of Canada enjoy at the moment. At the conclusion of this booklet will be found a reproduction of this letter. Included with this letter was the additional material found in this booklet. A copy of my letter to Mr. Levesque, along with copies of the additional material, was subsequently mailed to each of the premiers of the provinces of Canada.

I desire to express my gratitude to Mr. R. Rogers Smith, who as my private tutor for almost the entire fourteen years during which I served as a member of the House of Commons, brought to my attention facts from the statutes at large, from the Archives and from original historical sources, the material upon which this brochure is based.

Walter F. Kuhl.

John A. Macdonald

Confidential. *Revise, 23 Jan. 1867.*

British North America.

DRAFT

OF A

BILL

FOR

The Union of the British North American Colonies, and for the Government of the United Colony.

[*Qu. whether to try the Eastern B. N. A. Colonies.*]

WHEREAS ~~the~~ Such Union of the British North American Colonies ~~for Purposes of Government and Legislation~~ would be attended with great Benefits to the Colonies and be conducive to the Interests of the United Kingdom:

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

Whereas the Provinces of Canada N S & N B have expressed their desire to form a Federal Union for the purposes of Govt and Legislation based on the principles of the British Constitution and

Preliminary.

1. This Act may be cited as The British North America Act, 1867. Short Title.

[*Here would follow:*
1. *Any Interpretation Clause that may be necessary.*
2. *Clause repealing Imperial and Colonial Acts, if necessary.*]

(*0.20.*) A *Union.*

On the left is the preliminary draft by the Colonial Office. This means the Domination of the Colony, or the uniting of the Colonies into One Dominion. This is the basis of the British North America Act.

On the right is the desire of the Provinces to unite into a Federal Union; which means freedom.

Drafted by John A. Macdonald before he received his title. One draft is diametrically opposed to the other.

—22—

This is a copy of a page from, "INSIDE CANADA", a publication by R. Rogers Smith.

House of Commons
Canada

Dear Mr. Kuhl,

I see you are still favouring a good policy. The idea is progressing. The only thing wrong with it is that it has not been proposed by a cabinet-minister.

Arthur Beauchesne

Nov 28 - 1940

This is a copy of a personal note sent to me by Dr. Beauchesne following a speech I made on Canadian constitutional problems, on June 25, 1940.

W. F. KUHL

CANADA

House of Commons Debates

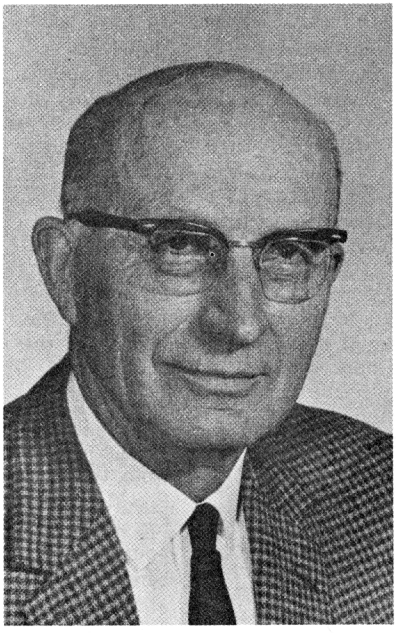
OFFICIAL REPORT

SPEECH

OF

Mr. W. F. KUHL

MEMBER FOR JASPER-EDSON



ON THE SUBJECT OF

A DISTINCTIVE NATIONAL FLAG

— AND —

CONSTITUTIONAL PROBLEMS IN CANADA

DELIVERED IN THE HOUSE OF COMMONS ON THUSRDAY, NOVEMBER 8, 1945

A DISTINCTIVE NATIONAL FLAG

AND

CONSTITUTIONAL PROBLEMS IN CANADA

Mr. W. F. KUHL (Jasper-Edson): This resolution urges the expediency of Canada's possessing a distinctive national flag. I agree that an anomaly exists with respect to the matter of a Canadian flag, and I and my associates in parliament are in favour of removing this condition. But personally I consider that under the constitutional conditions prevailing in this country at the moment such action is premature. There are other and more important actions to be taken before it is appropriate to adopt a new flag.

The flag question is just one of the many anomalies which exist in Canada's constitutional position. Some of these have been referred to this afternoon. One of them, the matter of Canadian citizenship, is intended to be dealt with at this session. There are others, such as amendments to the constitution, appeals to the privy council, the power of disallowance, the matter of a federal district proper—and doubtless there are others. All these anomalies ought to be dealt with, and I am personally in favour of dealing with them at the earliest possible opportunity. But I consider that the present piecemeal method is improper as well as undemocratic. I contend that the people of Canada are not being consulted in the manner in which I believe they ought to be concerning their rights in these questions.

To Account For Anomalies

I wish to indicate, Mr. Speaker, my reasons for contending that the method that is proposed to attempt to remove these anomalies is improper and undemocratic. Then I wish to indicate what I consider to be the proper method to use. To do this I first wish to endeavour to account for the constitutional circumstances in which we find ourselves at the moment.

The question which must occur to every hon. member of this house and to every other citizen in this country is, why do such anomalies exist in our constitutional position? How did they come about? There must be something in Canada's constitutional history that accounts for the circumstances in which we find ourselves. No other part of the British empire finds itself in the same circumstances. Why are these conditions peculiar to the people of Canada? In endeavouring to answer these questions, and in suggesting what I consider to be the proper remedy for them, I am not posing as a constitutional expert, although I may say it is now ten years since I began my studies on this subject, and I trust I shall not be considered presumptuous in claiming to have added a little to my knowledge in that time.

The matters which I wish to discuss are those with which every public school child in the seventh and eighth grades, every high school student, and certainly every voter, should be thoroughly familiar. Every citizen in the land should know by what authority we do things in this country. On several occasions during the past two parliaments I have argued the case I am about to introduce, but very little attention was paid to my statements either in the house or out of it. On this occasion I intend to be heard, and if not I demand to know the reason why. I consider that the situation which I shall discuss is of such importance that a reply or a comment should certainly be forthcoming from the Acting Prime Minister (Mr. Ilsley) the Minister of Justice (Mr. St. Laurent), and for that matter from all hon. members of the house. I and the people who have sent me here have a right to know whether there is or is not a basis in fact for my contentions, and if there is, they have the right to know what is going to be done about it.

Submit Reasoned Argument

I propose to make a reasoned argument supported by the best evidence I have been able to secure. If my argument is to be controverted, I demand that it be met with a reasoned argument and not with personal abuse and statements which are wholly irrelevant. I expect a more intelligent criticism of my argument than was exhibited by a certain hon. member when I discussed this subject in a previous parliament. In *Hansard*

of April 8, 1938, at page 2183, this little exchange took place between myself and the hon. member for Selkirk, Mr. Thorson:

Mr. Thorson: Would the hon. member indicate where he gets these queer ideas?

Mr. MacNICOL: He has queer ideas of his own.

Mr. KUHL: I continue:

Mr. Kuhl: I placed on *Hansard* on February 10 a clear outline of the reasons for my statement. If the hon. member wishes to refute any of the facts or arguments which I placed before the house, I shall be pleased to hear the refutation.

Mr. Thorson: Why battle against windmills?

I submit that the subject matter and the arguments which I presented on that occasion were worthy of more intelligent criticism than was exhibited by that hon. gentleman. I have long ago learned that when an individual has a weak argument, or no argument at all, he usually resorts to personal abuse of his opponent. If hon. members have not a better argument to make than Mr. Thorson made on that occasion, I suggest that they hold their peace.

In submitting my argument, Mr. Speaker, I wish to assure you that I am actuated by the highest possible motives. We proudly proclaim our faith in democracy; we proclaim it from the housetops. I wish to urge that we practice what we preach. Let us demonstrate democracy instead of merely paying lip service to it.

It is my desire to see the people of Canada consulted where their fundamental rights are concerned. I wish to see government of the people by the people. These are the motives which actuate me in what I have to say on this resolution.

In presenting the special case I am about to discuss I am not necessarily speaking as a member of the Social Credit group; I am speaking as a native of Canada. The matters on which I am to speak are of fundamental concern to every citizen of Canada regardless of his or her political persuasion. They are among the most serious matters upon which a citizen can be called to think; they are the bed-rock considerations of human government.

Basic Premises

In order to endeavour to account for the contradictions in Canada's constitutional position and to suggest a remedy therefor, I wish to lay down some fundamental premises on which I shall base my entire argument. Locke is credited with saying:

Men being by nature all free, equal, and independent, no one can be put out of this estate and subjected to the power of another without his consent. The only way whereby anyone divests himself of his natural liberty and puts on the bonds of civil society is by agreeing with other men to join and unite into a community.

Jefferson, in the declaration of independence, states:

We hold these truths to be self-evident; that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness; that to secure these rights governments are instituted among men, deriving their just powers from the consent of the governed.

Federal Union Defined

In addition to that premise I wish to indicate the definition of a federal union. What is a federal union? Bouvier in his law dictionary defines "federal government" as:

—a union or confederation of sovereign states, created either by treaty, or by the mutual adoption of a federal constitution.

Doctor Ollivier, joint law clerk of the House of Commons, on page 85 of the report of the special committee on the British North America Act, said:

A confederation is a union of independent and sovereign states bound together by a pact or a treaty for the observance of certain conditions dependent upon the unanimous consent of the contracting parties, who are free to withdraw from the union.

A. P. Newton, in his book entitled "Federal and Unified Constitutions," at page 5 says:

A federal state is a perpetual union of several sovereign states based first upon a treaty between those states or upon some historical status common to them all, and secondly upon a federal constitution accepted by their citizens.

Two points stand out prominently in these definitions. The first is that the states which form the union must be sovereign, free and independent before they federate; the second, that the federal constitution which forms the basis of the union must be accepted by the citizens of the federating states. I think it worth while in this connection to point out that when the states of Australia federated, the people of Australia were provided with two opportunities of voting on their constitution. I should like to quote a paragraph from a history of the Australian constitution by Quick and Garran. This paragraph is on the meaning of the words "have agreed" in the constitution, and it states:

These words make distinct and emphatic reference to the consensus of the people, arrived at through the procedure, in its various successive stages, prescribed by the substantially similar enabling acts adopted by the legislatures of the concurring colonies. In four of the colonies acts were passed enabling the people to take part in the framing and the acceptance or rejection of a federal constitution for

Australia. Through those acts the people agreed, first, to send representatives to a federal convention charged with duty of framing for Australia a federal constitution under the crown in the form of a bill for enactment by the imperial parliament, and, secondly, they agreed to pronounce their judgment upon the constitution at a referendum, which in each colony was arranged to follow the convention. In all the colonies, the constitution was eventually referred to the people. At this referendum each voter was enabled to vote by ballot "yes" or "no" on the question asked on the ballot paper, "Are you in favour of the proposed federal constitution?"

In this manner there was in four colonies a popular initiative and finally in all the colonies a popular ratification of the constitution, which is thus legally the work, as it will be for all time the heritage, of the Australian people. This democratic method of establishing a new form of government may be contrasted with the circumstances and conditions under which other federal constitutions became law.

Federal Union Desired In 1867

Now I should like to ask a few questions concerning our position in Canada. Did the provinces of Canada desire federal union? The Quebec resolutions, the London resolutions and the draft of the bill by the London delegates all indicate that the provinces of Canada desired federal union. The preamble to the Quebec resolutions reads:

> The best interests and present and future prosperity of British North America will be promoted by a federal union under the crown.

Clause 70 of the Quebec resolutions indicates that whatever agreement was arrived at by the delegates would be submitted to the provinces for their approval. It reads:

> The sanction of the imperial and local parliaments shall be sought for the union of the provinces, on the principles adopted by the conference.

Furthermore, a bill drafted in London by the Canadian delegates contains the same preamble that appears in the Quebec resolutions, and this draft bill also contains a repealing clause which hon. members can find on page 179 of Pope's "Confederation Documents". It reads:

> From and after the union, all acts and parts of acts passed by the parliament of Great Britain, the parliament of the United Kingdom of Great Britain and Ireland, the legislature of Upper Canada, the legislature of Lower Canada, the legislature of Canada, the legislature of Nova Scotia, or the legislature of New Brunswick, which are repugnant to or inconsistent with the provisions of this act shall be and the same are hereby repealed.

Canada Not Federated Under B.N.A. Act

The next question is: Did Canada become a federal union under the British North America Act. I submit that the manner in which the bill was drafted and the manner in which it was enacted throw much light on the answer to this question. The act was drafted by the law officers of the crown attached to the colonial office. Lord Carnarvon, secretary of state for the colonies, was the chairman of the conference. Sir Frederick Rogers, under-secretary for the colonies, in Lord Blachford's Letters, is quoted as saying at page 301:

> They held many meetings at which I was always present. Lord Carnarvon was in the chair, and I was rather disappointed in his power of presidency.

In reading accounts of the times it is quite obvious that the bill which was drafted by the colonial office seems to have prevailed over that which was drafted by the delegates from Canada. The title and preamble of the bill drafted by the colonial office read:

> The union of the British North American colonies, and for the government of the united colony.
>
> Whereas the union of the British North American colonies for the purposes of government and legislation would be attended with great benefits to the colonies and be conducive to the interests of the United Kingdom;—

That is the preamble of the draft bill submitted by the colonial office, whereas the preamble of the bill drafted by the Canadian delegates reads:

> Whereas the provinces of Canada, Nova Scotia and New Brunswick have expressed their desire to form a federal union under the British crown for the purpose of government and legislation, based upon the principles of the British constitution;—

I submit, Mr. Speaker, no evidence is to be found to show that the preamble which we find in the printed copies of the British North America Act in Canada was either discussed or proven in the British parliament. This preamble reads:

> Whereas the provinces of Canada, Nova Scotia and New Brunswick have expressed their desire to be federally united into one dominion—

Lord Carnarvon, who introuced the bill on February 19, 1867, used these words as reported at page 559 of the British *Hansard:*

> The bill opens by reciting the desire of the several provinces to be federally united.

Furthermore Lord Campbell, speaking to the bill on February 26 of the same year, is reported at page 1012 of the British *Hansard* as having said:

> The bill is founded, I believe, on what is termed the Quebec scheme of 1864. When the resolution, which alone engages the Nova Scotian parliament, was in debate, its whole tenor, as our papers show, were against that project. The leader of the government was understood distinctly to renounce it. Our lights, indeed, may be imperfect upon this part of the subject, and I will not dwell upon it. But one thing

is clear, the preamble of the resolution comes before us in full and perfect authenticity. The preamble lays down the expediency of confederating British North America.

I submit it should be evident from these quotations that the preamble which was discussed was that to be found in the Quebec resolutions, not the one we find in the printed copies of the British North America Act in Canada.

A pertinent question to ask at this point would be: when was the present preamble placed in the British North America Act? Why was it not discussed in the British parliament, and, furthermore, what is the significance of an act bearing a preamble which was not even discussed, let alone proven? Another point of significance in connection with this, I believe, is the undue haste with which the bill was passed through the imperial parliament. When second reading was called for the bill was not even printed. At page 1090 of British *Hansard* for February 27, 1867, we find these words:

Mr. Hatfield said he rose to ask the government why it was the second reading of this bill had been fixed for to-morrow. It was one which affected 4,000,000 of people and upon which great doubts and differences of opinion were entertained. It was not yet printed and was of so important a character that he thought some little time ought to elapse after it was in the hands of the members before it was introduced in order that some little consultation should take place upon it. He was not at all sure that he should be opposed to it but he certainly required more time to consider it.

Later, on page 1195, on February 28, we find this:

He (Mr. Hatfield) thought that a bill of such great importance ought not to be passed through parliament with such haste. It was read a third time in the House of Lords only on Tuesday night and two days after they were called to give it a second reading in that house (Commons) that was a bad precedent to establish and might produce ill effect at another time. If the bill had been delayed only for a few weeks, the people of Nova Scotia would have been able to express an opinion upon it. He had not had time to consider either the bill itself or the papers on the subject which had been put into his hands.

Another significant statement is that by John Bright, which we find at page 1181 of British *Hansard* for February 28, 1867, as follows:

I have heard there is at present in London a petition complaining of the hasty proceedings of parliament and asking for delay, signed by 31,000 adult males of the province of Nova Scotia and that petition is in reality signed by at least half of all the male inhabitants of that province. So far as I know, the petition does not protest absolutely against union but against the manner in which it is being carried out by this scheme and bill and by the hasty measures of the colonial office . . .

Nobody pretends that the people of Canada prefer a nominated council to an elective council . . . I regret very much that they have not adopted another system with regard to their council or senate, because I am satisfied—I have not a particle of doubt with regard to it—that we run a great danger of making this act work ill almost from the beginning . . .

For my share, I want the population of these provinces to do that which they believe to be the best for their own interests—remain with this country if they like or become independent states if they like.

Conclusions

From the evidence which I have thus far submitted I draw the following conclusions:

1. The provinces of Canada desired a federal union.

2. The Quebec resolutions provided for a federal union.

3. The bill drafted by the Canadian delegates at the London conference also provided for a federal union.

4. The colonial office was not disposed to grant the provinces of Canada their request for a federal union.

5. The British North America Act, enacted by the imperial parliament, carried out neither the spirit nor the terms of the Quebec resolutions.

6. Canada did not become a federal union under the British North America Act, but rather a united colony. The privilege of federating, therefore, was still a future privilege.

7. The parliament of Canada did not become the government of Canada, much less a federal government. It became merely the central legislature of a united colony, a legislative body whose only power was that of aiding and advising the governor general as agent of the imperial parliament.

8. The British North America Act, as enacted by the imperial parliament, was not a constitution, but merely an act of the imperial parliament which united four colonies in Canada into one colony with the supreme authority still remaining in the hands of the British government.

Further Evidence

As further evidence that the British North America Act was not a constitution, and that Canada did not become a federal union, I refer to the definition of the term "dominion" which is to be found in section 18, paragraph 3 of the Interpretation Act of 1889. It reads as follows:

The expression "colony" shall mean any of Her Majesty's dominions, exclusive of the British islands and of British India; and where parts of such dominions are under both a

central legislature and local legislatures, all parts under the central legislature shall, for the purpose of this definition be deemed to be one colony.

Excepting Canada, no country in the empire had a central legislature and local legislatures. Therefore, according to this definition made twenty-two years after the enactment of the British North America Act, Canada is deemed to be one colony.

To show that I am not alone in my conclusions I quote some of the statements of recognized Canadian constitutional authorities before the special committee on the British North America Act in 1935.

Doctor W. P. M. Kennedy, Professor of Law in the University of Toronto, at page 69 of the report states:

I think we have got to get away from the idea that the British North America Act is a contract "or treaty". I do not want to go into that, but it is true neither in history nor in law. The British North America Act is a statute, and has always been interpreted as a statute.

Professor N. McL. Rogers, of Queen's University, at page 115 of the report states in reply to a question by Mr. Cowan:

Mr. Cowan: You do not subscribe to the belief that this was a pact or contract?

Mr. Rogers: I am thoroughly convinced it is not, either in the historical or the legal sense.

Then I would quote Doctor Beauchesne, Clerk of the House of Commons, who at page 125 states.

It is quite true that if we apply to the British North America Act the principles followed in the interpretation of statutes, it is not a compact between provinces; it is an act of parliament which does not even embody all the resolutions passed in Canada and in London prior to its passage in the British parliament where certain clauses that had not been recommended by the Canadian provinces were added.

The evidence which I have submitted establishes to my satisfaction that there has been at no time in Canada any agreement, pact or treaty between the provinces creating a federal union and a federal government. The privilege to federate therefore was still a future privilege for the provinces of Canada.

Provinces Completely Sovereign

Since the condition of sovereignty and independence must be enjoyed by the provinces before they can federate, it was necessary that the British government relinquish its authority over them. This was done through the enactment of the statute of Westminster on December 11, 1931. By section 7, paragraph 2, of this statute, the provinces of Canada were made sovereign, free and independent in order that they might consummate the federal union which they wished to create in 1867, but were not permitted to do so.

Since December 11, 1931, the provinces of Canada have not acted on their newly acquired status; they have not signed any agreement, they have not adopted a constitution, and the people of Canada have not ratified a constitution. Such action should have been taken immediately upon the enactment of the statute of Westminster. It is by reason of the failure of the provinces and of the people of Canada to take this action that all the anomalies in our present position exist. We have been trying since 1931 to govern ourselves federally, under an instrument which was nothing more than an act of the imperial parliament for the purpose of governing a colonial possession.

Not only has this anomalous condition obtained since 1931, but it has done so without any reference whatsoever having been made to the Canadian people. They have not been consulted on anything pertaining to constitutional matters. Before there can be a federal union in Canada and a federal government, the provinces of Canada must be free and independent to consummate such a union. They have been free to do so since December 11, 1931, but they have not done so.

Canada Without A Constitution

I therefore pose this question: Whence does the dominion parliament derive its authority to govern this country? The imperial parliament cannot create a federal union in Canada or constitute a federal government for the people of Canada by virtue of the British North America Act or any other act. This can be done only by the people of Canada, and they have not yet done so.

Since December 11, 1931, as an individual citizen of this country I have had the right to be consulted on the matter of a constitution. I have had the right along with my fellow citizens to ratify or to refuse to ratify a constitution, but I have not been consulted in any way whatsoever. I assert therefore that until I, along with a majority of Canadians, ratify a constitution in Canada, there can be no constitution, and I challenge successful contradiction of that proposition.

Mr. POULIOT: Were you born in 1867?

Mr. KUHL: Not that I recall.

Mr. JOHNSTON: Were you?

Mr. POULIOT: No.

Mr. KUHL: Those who were in charge of Canadian affairs in 1931 were under obligation to acquaint the people of Canada with the

constitutional position obtaining at the time and to prepare them so that they would be able to act upon their altered status.

Mr. JAENICKE: What about section 7 of the statute of Westminster?

Mr. KUHL: I have already answered that. I have indicated the position of the British North America Act, and have pointed out that it has not been accepted as a constitution by the people of Canada.

Mr. JAENICKE: The statute of Westminster made the provinces autonomous.

Mr. KUHL: Yes.

Mr. JAENICKE: What about section 7 of the statute of Westminster?

Mr. KUHL: Which one?

Mr. JAENICKE: Amending the British North America Act.

Mr. KUHL: Just exactly as I have said, there can be no constitution in Canada, whether it is on the basis of the British North America Act or any other act, until the people of Canada accept it. They have not accepted it.

Mr. COLDWELL: We have been acting under the British North America Act since 1867.

Mr. KUHL: That does not alter the situation.

Mr. JAENICKE: What are you going to do about it?

Remedy For Condition

Mr. KUHL: Before I resume my seat I shall indicate definitely what to do about it. The people of Canada have not acted on the altered constitutional status; hence the deplorable constitutional position in which we find ourselves in this country. I know of no country which is in such shocking constitutional circumstances as Canada. As a native of this country it is most humiliating to me to be obliged to continue to accept this position, and I am determined to do my part to rectify that position.

Legally Canada is in a state of anarchy and has been so since December 11, 1931. All power to govern in Canada since the enactment of the statute of Westminster has resided with the provinces of Canada and all power legally remains there until such time as the provinces sign an agreement and ratify a constitution whereby they delegate such powers as they desire upon a central government of their own creation. Since December 11, 1931, the parliament of Canada has governed Canada on assumed power only. It is imperative that this situation be dealt with in a fundamental way. Patchwork methods will not suffice. Obviously the first act is that the provinces of Canada shall sign an agreement authorizing the present parliament to function as a provisional government. That is number one in answer to my hon. friend. Secondly, steps must then be taken to organize and elect a constituent assembly whose purpose will be to draft a constitution which must later be agreed to by the provinces and then ratified by the people of Canada. The dominion-provincial conference is to reconvene in the near future. This would be a most appropriate time and a most appropriate occasion on which to initiate action of this kind. I trust that the de egates to this conference will not disappoint us in this matter. I shall observe with much interest what will be said in this conference on constitutional relationships in Canada.

Proposals Endorsed

To show that I am not alone in my proposal I quote Doctor Beauchesne from the evidence of the special committee on the British North America Act in 1935. On page 126 of the evidence he is credited with saying:

—the statute of Westminster has altered our status . . .

The time has come in my humble opinion, when the British North America Act, except as to minority rights, should be transformed and a new constitution more in conformity with present conditions should be adopted. Amendments here and there would be mere patchwork which could not last. The people of 1935 are different from those of 1867. What we want is a new constitution . . .

The new constitution must leave nobody with a grievance. A spirit of conciliation should predominate. For these reasons, the task must be entrusted to an independent body in which all the elements of the country will be represented. I, therefore, beg to suggest an imposing constituent assembly formed of eminent men coming from all parts of Canada. Provincial conferences, attended by a few ministers meeting behind closed doors, would hardly satisfy public opinion. The debate should be public . . .

I want the assembly to sit in a city in the west. It would not be necessary for a delegate to be a member of parliament or of a provincial legislature . . .

And on page 128 Doctor Beauchesne is reported as follows:

I would suggest that the assembly do not sit in Ottawa, in order that it may not have the appearance of being dominated, or even influenced by the dominion power; and, as the western provinces are of such paramount importance in the country, I suggest the best city for the representatives to gather in would be Winnipeg.

And again on page 131:

There have been many disputes about provincial rights since 1867 and it seems certain that

when a new constitution is drawn up, the distribution of federal and provincial powers will have to be modified.

And page 135:

I think the time is ripe for a change in the constitution. I do not think you would need much publicity in order to draw to the attention of the people of this country that the British North America Act is inadequate.

And finally on page 129:

Whether our country should be changed from a dominion to a kingdom is also a subject which might be discussed. I would suggest that the country should be called "the federated states of Canada."

I should also like to quote in this connection a resolution which was adopted at a convention of Social Credit supporters and monetary-reform-minded people held in the city of Edmonton in 1942. This resolution is to be found at page 59 in the publication "Prepare Now," issued by the bureau of information, legislative building, Edmonton. It reads as follows:

Whereas the statute of Westminster, in granting complete sovereignty and equality with Great Britain to Canada and other nations of the British commonwealth, has changed the relative positions of the provincial and federal governments as provided in the B.N.A. Act: and

Whereas it is desirable and expedient in the interests of national unity that an interprovincial conference of appropriate representatives of the Canadian provinces be held for the purpose of reviewing and adjusting the constitutional relationship as between the provinces and their central government with a view to providing effective democratic government in Canada:

Therefore be it resolved that without in any way prejudicing or jeopardizing the rights and privileges of any minority group in Canada, a comprehensive conference of representatives of the provinces be held for the purpose of considering:

1. The existing legislative and administrative organization in the provincial and federal spheres.

2. A more expedient allocation of powers as between the provincial and federal authorities.

3. Ways and means of facilitating the drafting, the adoption and the implementation of a Canadian constitution in keeping with the rights granted in the statute of Westminster.

I contend, Mr. Speaker, that such are the actions which should be taken before it is appropriate to adopt a distinctive national flag. I submit that the adoption of a new flag of our own designing should be the crowning act to putting our constitutional house in order.

I believe that the statements which I have placed upon the record are historical facts. I believe that the conclusions which I have drawn from these facts are the only ones which can be drawn from them, and I believe, consequently, that the solution which I have suggested is the only one adequate for the circumstances. If hon. members of this assembly can successfully dispute either the facts which I have submitted or the conclusions which I have drawn therefrom, I shall be prepared to withdraw those conclusions, but if they do not do so, I believe the people of the country have a right to know what they propose to do in the circumstances.

It was my intention to move an amendment, but as one has been moved already I shall refrain from doing so until the amendment already moved has been dealt with. So far as the substance of that amendment is concerned, I repeat what I have previously indicated. I think it is premature to consider any flag, either the one suggested in the amendment or any other. There are other and more important actions to be taken before we can consider the adoption of a new flag.

OTTAWA: Printed by EDMOND CLOUTIER, Printer to the King's Most Excellent Majesty, 1945.

PERTINENT CLAUSES

FROM

THE STATUTE OF WESTMINSTER

AND

OTHER STATUTES

2. (1) The Colonial Laws Validity Act, 1865, shall not apply to any law made after the commencement of this Act by the Parliament of a Dominion.

(2) No law and no provision of any law made after the commencement of this Act by the Parliament of a Dominion shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of any existing or future Act of Parliament of the United Kingdom, or to any order, rule or regulation made under any such Act, and the powers of the Parliament of a Dominion shall include the power to repeal or amend any such Act, order, rule or regulation in so far as the same is part of the law of the Dominion.

4. No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend or be deemed to extend, to a Dominion as part of the law of that Dominion, unless it is expressly declared in that Act that that Dominion has requested, and consented to, the enactment thereof.

7. (1) Nothing in this Act shall be deemed to apply to the repeal, amendment or alteration of the British North America Acts, 1867 to 1930, or any order, rule or regulation made thereunder.

(2) The provisions of section two of this Act shall extend to laws made by any of the Provinces of Canada and to the powers of the legislatures of such Provinces.

(3) The powers conferred by this Act upon the Parliament of Canada or upon the legislatures of the Provinces shall be restricted to the enactment of laws in relation to matters within the competence of the Parliament of Canada or of any of the legislatures of the Provinces respectively.

11. Notwithstanding anything in the Interpretation Act, 1889, the expression "Colony" shall not, in any Act of the Parliament of the United Kingdom passed after the commencement of this Act, include a Dominion or any Province or State forming part of a Dominion.

THE INTERPRETATIONS ACT, 1889.

Sec. 18, Par. 3, — The expression "Colony" shall mean any of Her Majesty's Dominions exclusive of the British Islands and British India, and where parts of such dominions are under both a Central Legislature and Local Legislature for the purposes of this definition shall be deemed to be one Colony.

THE COLONIAL LAWS VALIDITY ACT, JUNE 29th, 1865.

Sec. 6, — Any proclamation purported to be published by the authority of the Governor, circulating in any newspaper in the Colonies, signifying Her Majesty's assent to any such Colonial law or Her Majesty's disallowance of any such reserved bill as aforesaid, shall be prima facie evidence of such disallowance or assent.

EXPLANATION

OF

THE STATUTE OF WESTMINSTER

BY

WALTER F. KUHL

The Parliament of a Dominion in Section 2 does not refer to the legislative body sitting in Ottawa on December 10, 1931. The legislative body sitting in Ottawa the day before the Statute of Westminster was passed, according to the Interpretations Act of 1889, Sec. 18, Par. 3, was the Central Legislature of a United Colony, whose only function and authority was to aid and advise the Governor General as the agent of the British Government.

Section 2 does not validate the Central Legislature of a United Colony as the Federal Parliament of a Federal Union. A Federal Union in Canada can be created only by completely independent and autonomous provinces, which Section 7 (2) provides for.

As a consequence of Section 11, the term, Dominion, can now be applied to a Federal Union, and the term, the Parliament of a Dominion, can now be applied to a Federal Parliament and not be inconsistent insofar as a definition is concerned. However, the British Government can no more convert the Central Legislature of a United Colony into the Federal Parliament of a Federal Union, by changing definitions, than it can turn water into wine.

The only validity which the B.N.A. Act has since December 11, 1931, is as a guide to the creation of a Federal Union which only the provinces can bring about. The provinces of Canada are free to use it as a guide in the creation of a Federal constitution or they may reject it completely in favour of a constitution of their own making.

As an analogy, it might be said that the relationship which the original provinces entered into under the B.N.A. Act was a sort of shotgun marriage; they were forced into a United Colony against their will. The Statute of Westminster gave the provinces their independence so that they could consumate a voluntary marriage but they have not yet done so. Ever since December 11, 1931, the provinces have been living common-law with Ottawa and have the right to terminate this arrangement at any time that they wish.

Spruce Grove, Alta.,
R.R. 1,
November 23rd, 1976.

The Hon. Rene Levesque,
Premier-elect,
Province of Quebec,
Quebec, P.Q.

Dear Mr. Levesque:

Congratulations on your magnificent personal victory and that of your Parti Quebecois in the recent Quebec election.

As a student of Canadian constitutional history and of Canadian constitutional problems for some 40 years, I am tremendously interested in the constitutional implications of your recent political victory.

For 14 years, from 1935 to 1949, it was my privilege to serve as a member of the House of Commons, from the province of Alberta. The withholding of assent to some Alberta legislation in those years by the Lieutenant-Governor and the disallowance of other Alberta legislation by the people at Ottawa, set me to investigating how these things could be. I was assisted in my studies by R. Rogers Smith who was personally acquainted with a one-time private secretary to John A. Macdonald at the time when the B.N.A. Act was being enacted. Through this source I have become acquainted with much information concerning the history of the B.N.A. Act which is not to be found in text books.

All this information has led me to the conclusion that the existing constitutional circumstances are shocking to the point of unbelief. However, in my considered opinion, after 40 years of intensive study, these existing constitutional circumstances are of such a nature that they can be of extreme advantage to you in governing your province.

I am enclosing copies of some of the addresses which I delivered in the House of Commons on the subject as well as copies of a pamphlet by Mr. Smith, dealing with the same subject. If you have not already been made acquainted with this material I trust it will prove enlightening and helpful to you in the constitutional considerations you obviously are going to become involved in.

Although the enclosed material should give you a clear outline of what I conceive to be your present standing constitutionally as a province, I would like to give you a brief summary of what I believe to be your present position.

So far as separation is concerned, rather than it being necessary to seek separation rights through a referendum, THE PROVINCE OF QUEBEC IS ALREADY COMPLETELY CONSTITUTIONALLY SEPARATED FROM THE REST OF CANADA! ! ! ! ! This is equally true of every other province in Canada and has been so since December 11, 1931, through the Statute of Westminster.

HOW CAN YOU BE DIVORCED IF YOU HAVE NEVER BEEN MARRIED?

In other words, ever since the enactment of the Statute of Westminster in 1931, by the British Government, each of the provinces of Canada has been a completely sovereign and independent state and because the provinces have signed nothing since then constituting a Federal Union and a Federal Government, and because no such has been ratified by the people of Canada, the provinces still enjoy the status of sovereignty and are privileged to use it in any way they see fit.

As you will observe from the enclosed addresses, I quote eminent Canadian constitutional authorities as suggesting that the only and logical solution to the existing constitutional circumstances is the drafting and and the adoption of a proper federal constitution in which the provinces can reserve for themselves any and all powers necessary to enable them to govern their provinces successfully.

I am sure you can appreciate that if this were done, you could solve your economic and other problems in Quebec without resorting to separation. I feel sure that having the ability to solve your problems and still remain constitutionally part of the country of Canada, would be much more satisfactory to your supporters as well as to others within your province.

The following is a summary of the reasons for the things I have just stated.

1. At the time of the Confederation movement in Canada, the provinces of Canada, Nova

Scotia and New Brunswick desired to form a Federal Union.

2. The Quebec Resolutions of 1864 provided for a Federal Union.

3. The Bill drafted by the Canadian delegates at the London Conference in 1866, also provided for a Federal Union.

4. The Colonial Office of the Imperial Parliament was not disposed to grant the provinces of Canada their request for a Federal Union.

5. The British North America Act enacted by the Imperial Parliament carried out neither the spirit nor the terms of the Quebec Resolutions.

6. Canada did not become a Federal Union or a Confederation under the British North America Act, but rather a United Colony. The privilege of federation, therefore, was still a future privilege for the provinces of Canada.

7. The parliament of Canada did not become the government of Canada, much less a federal government; it became merely the central legislature of a united colony, a legislative body whose only power was that of aiding and advising the governor-general as agent of the Imperial Parliament.

8. The British Norfth America Act as enacted by the Imperial Parliament, was not a constitution but merely an act of the Imperial Parliament which united four colonies in Canada into one colony, with the supreme authority still remaining in the hands of the Brtish government.

9. The privilege of federating became realizable for the provinces of Canada, only through the enactment of the Statute of Westminster on December 11, 1931. Through this statute, the Imperial Parliament relinquished to the people of Canada their sovereign rights, and through them to their provincial governments as their most direct agents.

10. Since December 11, 1931, the provinces of Canada have not acted on their newly acquired status in the forming of a Federal Union, nor have the people of Canada ratified a constitution. Therefore the original proposition, namely: that all power to govern in Canada resides at the moment, with the provinces of Canada, and all power legally remains there until such time as the provinces sign an agreement and ratify a constitution whereby they may delegate such powers as they wish, to a central government of their own creation. In the meantime Canada exists as ten political units without a political superior.

Should you consider that there is merit in the information which I have given you, I would be very happy to meet with you personally to discuss in greater depth the implications of the unprecedented constitutional circumstances prevailing in Canada.

Yours for a better Canada,

Walter F. Kuhl

(Member of Parliament for Jasper-Edson, 1935-1949)